Superior Pontiac, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Amalgamated Local 55. Case 3-CA-11278

17 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 9 April 1984 Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Superior Pontiac, Inc., Hamburg, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In its exceptions the Respondent also contends that the Board should direct a hearing de novo on the ground that the judge was personally biased and prejudiced against its position in this case, and thus could not render an objective decision based on the record herein. Based on our careful examination of the entire record and the judge's decision in this case, we find no basis for concluding that the judge demonstrated a bias towards the Respondent in his analysis or discussion of the evidence, or in his credibility resolutions. Accordingly, we deny the Respondent's request as lacking in merit.

Finally, we correct two inadvertent factual errors in the judge's decision which do not affect the judge's ultimate conclusions. First, the judge quoted the pretrial affidavit of the Respondent's president, Richard Izzo, as stating that in October 1982 he stopped having used cars repaired in the collision shop, when, in fact, he stated in the affidavit that he stopped having "some" used cars repaired in October 1982 by collision shop employees. Secondly, we note that in setting out discriminatee Raymond Jarmusz' testimony the judge indicates that on 19 March 1982 Jarmusz placed certain repair orders he prepared on Supervisor Richard Watroba's desk, when, in fact, Jarmusz stated that he did so on 19 October 1982.

[2] In adopting the judge's findings of violations in this case, we do not rely on his speculative conclusion that the Respondent challenged Jarmusz' ballot in the representation election because it had "probable reason to believe [the election] would be closely contested."

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on April 25 and 26, 1983. The complaint, which issued on December 7, 1982, alleges that Superior Pontiac, Inc. (Respondent or Superior), by various named agents and supervisors, threatened its employees with a business closing if they voted in the Charging Party Union and that it would take retaliatory action if the instant case was not dropped,[1] and solicited grievances and in response promised higher wages and other benefits, in violation of Section 8(a)(1) of the Act, and caused a decrease in the hours worked by its collision shop employees and laid off employee Raymond Jarmusz in violation of Section 8(a)(3) and (1) of the Act. Respondent's answer[2] denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses and after careful consideration of the briefs filed by Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a New York corporation, with its principal office and place of business located in Hamburg, New York (the dealership), is engaged in the sale and distribution of new and used cars and trucks and related products at its dealership. Annually, Respondent, in the course and conduct of its retail business operations, sells and distributes products, the gross value of which exceeds $500,000. During the same period of time, Respondent receives goods valued in excess of $50,000 transported to its dealership directly from States of the United States other than the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

As part of its dealership, Respondent operates a collision shop and service shop, to repair and service the new and used cars it sells as well as cars brought in for service by outside customers. In the parlance of the trade, collision and service work performed on new cars sold by it is called warranty work (during the period covered by the warranty agreement on sale); such work performed on used cars received on customer trade in or otherwise is called internal work; and similar work performed for outside customers not under warranty is called customer work.

[1] This allegation was added to the complaint by way of amendment granted on motion made at the opening of the hearing.

[2] This pleading was not prepared or filed by counsel but by named agents and supervisors of Respondent and is certified by them and bears the signature of Respondent President Richard J. Izzo.

In the fall of 1982,[3] Respondent employed two employees to perform collision work, including painting, collision repair, and frame welding. They were, in order of seniority, Ronald Chelecki, employed since May, and Raymond Jarmusz, first employed on July 7. Other service employees included mechanics, helpers, washers, polishers, undercoaters, lubrication men, janitors, and parts department employees, totaling nine in all.

On or about October 11, Jarmusz called Larry Sardes, a union representative, and asked him what he would have to do about starting a union at the shop. Sardes agreed to meet with Jarmusz and said the employees would have to sign cards and return them to him to return to the Labor Board. Shortly after this conversation they met at lunch hour outside the dealership; Jarmusz received a batch of designation cards and he distributed them to employees after work the same day when they gathered at Santora's Pizzeria across the street from the dealership. The following day, the employees returned the signed cards to Jarmusz and he in turn met someone by prearrangement at lunch and handed over the cards with the understanding they would be given to Sardes.

By letter dated and mailed by regular mail on October 12, typed on union stationery, and addressed to Richard Izzo of Superior, Sardes advised that the Union represented a majority of his automotive garage service employees for purposes of bargaining, requested recognition as sole collective-bargaining agent, and expressed a desire for an immediate conference to discuss the matter. In the letter Sardes also informed Respondent that Jarmusz and Richard Ferguson, a line mechanic, had been selected to act jointly with him or any other business representative of the Union as representatives of the employees in matters pertaining to hours, wages, rates of pay, and other conditions of employment. The letter went on to caution against making unilateral changes in such terms or conditions of employment, and to advise that any attempt to intimidate, coerce, or interfere with the organizational rights of employees would be in violation of the law and necessitate union prosecution. An immediate response was requested. The record does not contain any evidence of a response.

On the same date, October 12, the Union filed a petition for certification of representative in Case 3-RC-8329 seeking an election in a unit of all service employees.

According to Jarmusz, in October, right before Respondent received the Union's demand letter, while he was in the body shop area with Ron Chelecki just before work, they informed Richard Watroba, the new collision shop manager, that they had started the Union and the Union was filing with the Labor Board. Watroba said the place was going to close when the union came in, "There's no way they're going to let the union come into the building." Jarmusz responded that he had been told by Larry Sardes he could not close the doors because of the Union no matter what happened.

About a week later, certainly after Izzo's receipt of the Union's letter and probably after Respondent's receipt of a copy of the Union's petition in Case 3-RC-8329 on October 20, Jarmusz approached Carl Seitz, parts manager, early in the morning in the service area. Jarmusz asked Seitz what he thought about the Union coming in. Seitz replied that he was told by Richard Izzo that they were going to close the place. Jarmusz replied that there was no way he was going to close.

During the week in which Jarmusz distributed the union designation cards he also spoke to Louis Staddon, service manager, at the service desk in the dealership. Jarmusz asked Staddon how he liked the union shop. Staddon said he worked for one before and he would not work for a union shop again. Staddon added that the shop would be closed by Richard if the Union was brought in.

According to Richard Ferguson, around the middle of October while he was in the parts room to pick up parts for a job he was working on, he told Seitz that "they were bringing a union in." Seitz told Ferguson specifically that if they would bring a union in, the Company would close. He added that it was not too bad an idea that they did get a union in there. Around the same time, Ferguson testified he was present in the body shop along with Jarmusz and Chelecki when Watroba responded to the employees' mentioning bringing a union in with the comment that, if they did bring a union in, the Company would close down. During his cross-examination, Ferguson was firm in his recollection that Watroba did not state that Richard Izzo told him the place was going to close and, further, that Watroba did not use the phrase the place "might" close if they went union but, instead, said the "place would close if we went union" and that this was not stated in response to any inquiry. As to the alleged threat by Seitz, Ferguson also confirmed on cross-examination that Seitz had not stated that it was his opinion that the dealership would close in response to a successful union campaign.

Roughly a week after returning the signed designation cards, Jarmusz had another meeting with Sardes in a parking lot near the dealership at which he received some union pamphlets, buttons, and bumper stickers. Early in the morning of Monday, October 25, at 7:50, Jarmusz passed out this union material to other employees in the service area and was observed doing so by Watroba, Seitz, and Staddon who were standing around in the immediate area. In the early afternoon the same day, October 25, right after lunch, Jarmusz was laid off allegedly because work was slow. The facts relating to this incident, the General Counsel's allegation and Respondent's defense will be dealt with shortly.

Following Jarmusz' layoff, according to Chelecki, the other body shop employee who continued working, on Thursday, October 28, Watroba called him into his office and then asked him what the guys were looking for as far as a contract, what they were trying to get out of it. Chelecki did not give him everything, but he told him roughly what the men had talked about. These demands included an increase in the weekly guarantee for body men and mechanics (at the rate of $8 an hour) from $200

[3] All dates hereinafter mentioned shall refer to the year 1982, unless otherwise noted.

to $260; $8 flat rate for body men and mechanics (up 50 cents for mechanics); bring the line duty mechanic, Tom Kozak, up to $6.50 or $7 per hour flat rate from his present $4 rate; pay the car wash man percentage of each car done instead of his present minimum wage; provide fully paid Blue Cross/Blue Shield coverage instead of having the employees pay half as at present and fully paid holidays as against $5 per hour now, and vacations based on weekly earnings instead of $200 a week; and provide some kind of protection by way of a burglar alarm for the $10,000 investment in tools the mechanics and body men stored at the dealership.

Watroba responded that he was having a meeting that night with Richard (Izzo) and the managers over the union activity and whatever else was going on.

The following Friday or Monday, October 30 or November 1, Watroba came back to Chelecki and told him that if the men voted the Union out[4] they would let them have a house union and that Richard offered to bring everybody's (body men and mechanic) salary to $8 an hour. He also offered the light duty mechanic and detailman an additional $2 an hour, put the carwash men on incentive pay, pay the employees' Blue Cross/Blue Shield in full, give full holiday pay, and athough Izzo would not get tool insurance he would put in burglar alarms to protect the men's tools. Watroba added that Richard wanted him and Lou to call a meeting with the men to "talk about this union thing." Chelecki told Watroba that it was a bribe to him and against the law and that it was not right for anybody else to find out about it, and not to tell any of the other men because he, Chelecki, was going to press charges either way. Chelecki also said, "What did you go and tell him [Izzo] for?" Chelecki thought their discussion had just been between the two of them. He was not negotiating. The meeting ended with Watroba telling Chelecki to keep this under his hat and not to tell anybody about it.

Subsequently, Jarmusz was recalled to work on February 4, 1983. The complaint and notice of hearing in this proceeding had previously issued on December 7, and had set April 25, 1983, for the opening of hearing. Jarmusz testified on April 25 that, within 2 weeks before the opening of the hearing, Richard Izzo called him into his office. Izzo told Jarmusz that it was going to cost him a lot of money to go through this and get a lawyer and stuff and he asked Jarmusz what he was going to do about it. Jarmusz replied that he really could not do anything about it now. It was in the Union's hands and the Labor Board's hands. He could not do anything about it. Izzo told him, "Yes, you could drop it." Jarmusz said no, and Izzo got a little mad, raised his voice and said, "I'll see, I'll see about that."

When Jarmusz was laid off, Watroba told him he would have to lay him off because Walter Schoenfeldt (Respondent's business manager/office manager) came into his office, said, "Work is slow, you're going to have to lay Jarmusz off." Jarmusz was also told that he would be called back if work picked up in the future. Prior to this date, October 25, Jarmusz had no advance notice of any impending layoff. According to Jarmusz, he had been paid for 46.3 hours of work[5] in the week commencing October 11, 2 weeks preceding his layoff. The following week, commencing October 18, Jarmusz was only paid for 6 hours' work, well below and apart from his guarantee. Thus, Jarmusz was able to testify on cross-examination that it was conceivable he was laid off because work was slow based on his own testimony.

Jarmusz also testified that before his layoff 75 percent of the collision work was internal on traded in used cars being prepared for resale and that Respondent had virtually no private outside customer work in October. Respondent's summary records received in evidence which reflected new and used car sales and collision shop dollar sales by the month, broken down by customer, internal, and warranty work for 1981 and 1982, show a seasonal pattern of very light internal repair work in the months from November or December to March. However, customer collision work in October and November 1982 was substantially higher than in the same months in 1981 ($7,775 vs. $4,325). This probably reflected at least in part the efforts of the new collision shop manager, Watroba, to solicit such business through newspaper advertisements which he placed starting shortly after his hire at the end of September. Furthermore, internal collision work in September and October 1982 was considerably greater than in the same months in 1981—$5700 for September and $3662 for October 1982, as against $2138 and $1850 for the same months in 1981. Total used car sales in 1982 (159) were also more than double the sales for 1981 (76) while new car sales increased by 50 percent over the 2 years.

The import of these figures then does not readily support Respondent's claim that work was slow or was anticipated to continue to be slow through the fall months in 1982 at the time that Jarmusz, as the least senior of the two collision shop employees, was laid off.

The General Counsel asserts two specific claims in support of its allegation that Respondent caused a decrease in the hours worked by its collision shop employees by reducing the amount of work performed in its collision shop, thus leading directly to Jarmusz' layoff.

First, Jarmusz testified that he had a special relationship with a customer, International Cable Television Company, which, by prearrangement, he personally estimated, was approved for, and performed all their collision repairs. This relationship antedated his employment by Respondent when he had previously done collision repairs while employed by his father in 1981. As corroborated by an International Cable vice president, Jarmusz had performed all repair work on its fleet of 50 trucks for approximately 2 years. Jarmusz' estimates for such work to his knowledge had never been rejected by the Company. Furthermore, where Jarmusz had been unable to do the work since his employment by Re-

[4] The representation election was held on November 12.

[5] As explained by Jarmusz and others, these hours did not reflect actual work hours but rather the book or manual hours specified for a particular operation or series of operations undertaken in repairing cars in the collision shop. Jarmusz' income was based on $8 per book hour. Each operation or job not only had a listed number of book hours by which the total job hours for a repair were computed but also a rate per hour or per job which the job, whether internal labor, warranty (manufacturer), or customer, was charged.

spondent, it had not been given to, or done by, Superior. This included the period covered by Jarmusz' layoff from Superior.

Before his layoff, Jarmusz had estimated and then worked on a number of repair jobs for International Cable. Then, on October 18, Jarmusz prepared two separate written estimates for International Cable on Superior estimate report forms which he had removed from the dealership with the prior approval of Watroba. One estimate was to paint and refinish a truck, including painting the logo on the hood, for a total of $942.18. Jarmusz received an immediate verbal approval from International Cable for this job after submitting the estimate. Since International Cable did not want to tie up two trucks simultaneously, the second estimate (to straighten and patch doors, replace a rear quarter panel, and refinish and repaint the truck for a total of $1254) was not immediately approved but in all likelihood would have been approved upon completion of work on the first truck and its return to active service; its repair would then immediately follow. Both estimates bear the date of October 18 after the printed word "Date" appears, along with the spaces for entry of other information about the repair, which were also filled in, on the top portion of the form. The forms were completed by Jarmusz in triplicate and, he swore, the original of each was left by him on Watroba's desk the next day, Friday, March 19, inside the metal looseleaf booklet which contains the estimate forms.

The smaller, approved estimate involved 46 hours of work at $19 per hour according to the book. The second, larger estimate to be approved involved 55 hours also at $19 per hour. Since Jarmusz' guaranteed share was $8 per hour, he would have received $808 and Superior would have received $1111 as a result of performance of these repairs. Yet, Jarmusz was laid off within the week and, as a consequence, with Jarmusz not personally available to perform the repairs, International Cable had both repair jobs done elsewhere and Superior did not receive either job or the direct financial benefit to be derived from performing them.

Respondent explains this result by claiming, through the testimony of Watroba, that the collision shop manager did not learn of these estimates until after Jarmusz' layoff, on November 11, when Jarmusz visited the dealership and left off both estimates. In support of this claim, Watroba's entry of the phrase "Received 11/11/82" appears at the top of the original of the estimate for $1284 to which the other original estimate had been stapled. Furthermore, Watroba also asserts that, even after he became aware of these estimates, he did not recall Jarmusz for business reasons. Since he had little available work for one man, much less two, it would have made little sense to keep two men employed with the guaranteed minimum payment required for each.

A second claim asserted by the General Counsel as to the necessity for Jarmusz' alleged economic layoff concerns the availability of internal body repair work which was purposely re-routed to other shops. Ronald Chelecki testified that Richard Izzo had regularly complained to him, Jarmusz, and, after Watroba's hiring, to Watroba, that their estimates for internal repairs, of used cars traded in by customers as well as other cars which were being delivered on Superior Car Carriers from Canada (whose odometers registered in kilometers and had to be changed to miles per hour while in the body shop), were too high and that the retail price for resale including the repairs was costing too much money. In spite of these complaints, according to Chelecki, the collision shop men always did the repair work on these cars. However, a week after Izzo had gotten the Union's demand letter, naming Jarmusz and another employee as union representatives, in Jarmusz' last week of employment before his layoff, the collision shop stopped doing repairs on the cars which had been delivered from Canada on Superior truck carriers. Although estimates continued to be made and written up, the cars did not remain in the shop, but disappeared for a week and then reappeared on the lot in a finished, repaired condition.

With respect to this latter claim, its force is somewhat diminished by virtue of Chelecki's failure to have asserted it in his affidavit to which he swore before a Board agent on Monday, November 1. In the paragraph relating to work on used cars since the start of the union campaign, Chelecki claims that Izzo has been selling the used cars as is rather than having them repaired. When he questioned Watroba about this, the response was either there was not any work to be done on them or Richard (Izzo) did not want any work to be done on them. Respondent's business manager since mid-November 1981, Walter Schoenfeldt, also denied that to his knowledge Superior ever sublet any cars for collision work. Schoenfeldt also professed lack of knowledge as to whether any cars were purchased by Superior for resale from Canada.

At the time Schoendfeldt participated in the decision to lay off Jarmusz he was not informed by Watroba that there was any immediate job based on any estimate Jarmusz may have submitted. If he had been so aware, they would not have laid him off if they had work coming in. Schoenfeldt was also aware that Jarmusz was a union representative who had been selected by the Union in early October. Schoenfeldt's participation involved questioning Watroba on the Friday preceding the layoff as to whether he had enough work for two people for the next week. This discussion had been preceded by a meeting that Friday, October 22, among Schoenfeldt, Watroba, Richard Izzo and his son, and General Manager Rick Izzo, as to whether there was enough incoming work to keep the two collision shop employees busy the following week. Watroba responded that he would not know until Monday. If he got these extra two jobs, they would have enough to keep two people busy. (These two jobs were never described.) On Monday morning, Schoenfeldt learned Watroba had not gotten the extra work and he then informed Watroba, "We're going to have to let one go." It was then that Watroba told Jarmusz he would have to be let go by Wednesday.

As to the layoff itself, Watroba testified that he went to Jarmusz on Monday, October 25, and told him that if they could not get more business by Wednesday, October 27, he would have to lay him off because he was the

younger man; that it was usual to give 3 days' notice of layoff. Watroba asserted that Jarmusz responded, "Well, if there's nothing here now, I'll go home at 11:30." Jarmusz then left at 11:30 and filed for employment insurance the next day. It was also Watroba's recollection that Jarmusz returned to the dealership on November 11, which he erroneously believed was the day of the representation election, and handed him the two International Cable estimates with the comment that he was the only one who could work on them. At the time of Jarmusz' layoff, on October 25, all that Jarmusz told him was that he might have more International Cable work, but he did not know when he would have it. Watroba also confirmed that, to his knowledge, Superior did not send out collision work.

As to the alleged threats and other acts of interference, Respondent witnesses testified as follows. Watroba recalled Jarmusz and Chelecki coming in to see him and telling him, "You know, we're going to start a union here," or, "We got a union here," to which he responded, "Ray, what do you want to do that for?" When Jarmusz told him they wanted certification, more Blue Cross/Blue Shield, Watroba replied, "Well, you know, can't we sit down and talk about this." Then Watroba asked, "What are you really after?" After the men told him about increasing the guarantee, fully paid health protection, tool protection, additional money for detail man and new car get ready man, Watroba testified he said, "Why don't you let me see what I can do with Mr. Izzo." The men said this was all right. Watroba went and talked with Richard Izzo with Walter Schoenfeldt present. He started by saying, "This is what the boys are looking for." Izzo cut him short by telling him, "I just got the union papers here and they told me I can't talk about it with the men." Watroba was told not talk to the men any further. Watroba denied he ever went back to Jarmusz and Chelecki to tell them the result of his conversation with Izzo, but he did learn from the men that they had already talked to the Union and the Union said not to talk to anybody about anything. Watroba specifically denied that this conversation about benefits took place with Chelecki only after Jarmusz was laid off. He also denied having any other conversations about the Union with employees, only telling them he worked with the Union before and it did not bother him whether they had a union in there or not.

As for dating Jarmusz' written estimates, he only did that because of the discrepancy between the date of October 18 already appearing on the documents and the much later date of November 11 that he received them. Watroba also recalled on cross-examination that Jarmusz had been in the shop during his layoff before November 11, but did not have any estimates with him on those occasions. Watroba also finally could not be specific after being pressed on the matter as to whether Jarmusz had come in to vote that day he brought in the estimates.

While Watroba readily referred during his testimony to Jarmusz' mention at the time of his layoff to the possibility of having International Cable repair work, in his affidavit, given to a Board agent, a portion of which was read into evidence, Watroba swore that at the time of the layoff and conversation Ray Jarmusz never mentioned International Cable work, a clear, emphatic, and impeachable conflict which Watroba was unable to adequately explain.

Finally, Watroba admitted under cross-examination that when he first learned from Jarmusz and Chelecki that they were bringing a union in he told them, "What do you want to do that for, this is the wrong time of year to start this, for the simple reason, we ain't got the work here. And I said to them, what the heck are you looking for, and this is what they told me they were looking for."

Louis Staddon, service manager, started work for Respondent even after Watroba did, on October 5. He acknowledged having been approached by Ferguson who worked under him, and that Chelecki may have been present, and asked about working under a union. He responded that he did not like working under or in a union shop but did not explain why. Under cross-examination, Staddon agreed it was possible that these employees asked what Richard Izzo would do if the Union came in and that he could have said he thought Izzo would close the business if the Union came in, basing this response on his own understanding of the financial condition of the organization without having any special knowledge of Izzo's business holdings or personal worth.

Carl Seitz, parts manager, had been employed since the end of August. He heard from Jarmusz and Ferguson that they were forming a union. He also heard from these men that Richard Izzo would close the business. It was in the form of a rumor that was traveling through the dealership. Seitz denied that he was asked about this rumor or that he ever passed it along. Since the rumors did not involve him and he did not want to get involved (although he questioned Richard Izzo about them and learned that Izzo would not close but thought a union would be a good thing because they would get better mechanics), he never took the occasion to deny or disavow them to the men.

Richard Izzo, called as a rebuttal witness by the General Counsel under Section 611(c) of the Federal Rules of Evidence, at first agreed that Ray Jarmusz was laid off for lack of work on a temporary basis, yet although Jarmusz' name was included on the eligibility list prepared by Respondent for use at the election, he later agreed, at the urging or suggestion of Walter Schoenfeldt, to have Jarmusz' name crossed out and to have him challenged as not entitled to vote because of his layoff. Izzo's testimony on this subject matter shows a confusion, lack of recall, and unwillingness to take responsibility for the challenge to Jarmusz' ballot which borders on the incredible. While Izzo did not recall any conversation with the Board agent conducting the election in which he referred to the layoff as permanent, Schoenfeldt later called to the witness stand as a surrebuttal witness to challenge Jarmusz' testimony that Schoenfeldt was, indeed, informed that a challenge to Jarmusz' vote would mean that he had been a permanent layoff, testified incredibly that at the time Jarmusz was challenged he told the Board agent that the layoff was temporary even though the Board agent had informed him that if the layoff was temporary, he, Jarmusz, would

still be eligible to vote. The result of this apparent prevarication and lack of candor was to strengthen the conclusion that, at the least, Respondent sought to take advantage of Jarmusz' temporary layoff by challenging the validity of his participation in an election which Respondent had probable reason to believe would be closely contested[6] and, at the most, that Jarmusz' layoff itself was part of a plan to frighten the employees into rejecting union representation altogether.

Izzo's testimony as the General Counsel's rebuttal witness also brought to the fore a contradiction between his trial testimony and pretrial affidavit which strengthened the General Counsel's contention that Respondent intentionally stopped doing used car repair work in October after the advent of the union organizing campaign (in spite of Chelecki's failure to include his testimonial claim of removal of such work in his affidavit).

Izzo denied categorically under oath that there ever came a time in October when he stopped doing used car collision work at the collision shop. His pretrial affidavit contradicts this assertion. In it, Izzo swore that "concerning the repair of used cars before resale, I did stop having used car repairs in the body shop because the estimates being turned in to me by the mechanics were too high," and testified that he could have stopped the used car repair work in October. Izzo then immediately stated he did not rembember when he stopped such work, then finally stated he only stopped such work on cars that were not warranted to put in the department, or not worth the money to fix. He denied that he took any cars to another shop for estimates. He also could not remember how frequently he told the mechanics that the repair estimates were too high.

Izzo's testimony thus vacillated and he became argumentative and pugnacious in responding to a legitimate and pertinent line of inquiry highly relevant to the General Counsel's allegation of discriminatory layoff of Jarmusz.

Respondent independently seeks to attack the credibility of Ferguson and Chelecki by showing that each employee harbored resentment and bias against Respondent because each was subsequently discharged for the unauthorized taking of company property from the premises. In the case of Ferguson, he signed a statement acknowledging that he removed an engine stand without permission. He also admitted that at the time he made this admission he had become so upset about losing his job he had threatened to give back the stand through Superior's front window. Chelecki admitted taking sandpaper having a value of approximately $80 for his own use but vehemently asserted that he had permission to do so. Chelecki also claimed that the statement he signed admitting the taking resulted from a lie detector test administered by a Respondent consultant at a time he had been unjustly accused of stealing a welding machine.

I am not persuaded that the circumstances surrounding the discharge of either employee led either of them to lie on the witness stand regarding his, or the Respondent supervisors', involvement in conversations regarding the union organizing campaign. To the contrary, both witnesses, and Jarmusz as well, stood up rather well under pressing cross-examinations during which they maintained their composure and repeated credibly their allegations of supervisor threats and, in the case of Chelecki, Watroba's solicitation of employee demands and later coupling of a promise of a house union and the terms and conditions of employment sought by the employees conditioned on voting out the Union.

In particular, I credit Chelecki that Watroba's solicitation and offer of increased benefits took place toward the end of October after Jarmusz' layoff and with him alone. I find incredible Watroba's denial that he ever returned to Chelecki with Izzo's offer of increased benefits after first soliciting the employees' conditions for resolving the labor dispute. I also credit Jarmusz that he submitted the International Cable estimates to Watroba about October 18 when he prepared them, and that, consistent with Schoenfeldt's understanding of the matter, Respondent would have retained Jarmusz to perform the collision repairs but for its discriminatory motive in ridding of itself the key union adherent on its work force during the crucial period immediately preceding and at the representation election held on November 12. Watroba's self-serving insertion of the November 11 date on the estimates cannot be believed under all the circumstances presented on the record including the fact that it makes no sense at all for Jarmusz to have delayed submitting them for more than 3 weeks after having first prepared them.

Finally, Izzo did not contest the implied threat which Jarmusz attributed to him on the occasion, within 2 weeks of the election, when Izzo sought to obtain Jarmusz' agreement to withdraw the charges pending hearing against his company.

Based on the admissions made by the Superior supervisors, Watroba's willingness to acknowledge his solicitation of the terms the employees were seeking and the circumstances under which he did so, Izzo's and Schoenfeldt's unbelievable testimony regarding their efforts to challenge Jarmusz' participation in the balloting, and Izzo's and Watroba's impeachments under oath, all in contrast to the generally credible and corroborative testimony of the employee witnesses, I find that the Respondent supervisors engaged in the conduct alleged in the complaint, threatened employees with a plant closing, solicited grievances, promised benefits in return, impliedly threatened adverse consequences if the complaint proceeding was not discontinued, and laid off employee Ray Jarmusz in an unlawful attempt to punish and frighten employees to reject collective-bargaining representation by the Union at a time when there was work available for him which he had solicited and when other repair work had been intentionally withheld in the period immediately preceding the representation election.

Analysis

Respondent contends that because the conversations in which employees were informed by different supervisors of a business closing if the union came in were, if anything, the personal opinions of the speakers, and were casual and informal in nature, and the conversations

[6] In fact, the Union won by a vote of 7 for to none against, with only Jarmusz' vote having been challenged.

were initiated by the employees themselves, the statements themselves were privileged and should not be held binding on Respondent. Furthermore, the election outcome negated any actual coercive impact.

The test for determining whether statements such as those made by Respondent's supervisors are violative of Section 8(a)(1) of the Act is whether it may reasonably be said, that the conduct engaged in tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959); see also *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir. 1946). Interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. *American Freightways Co.* supra at 147. Threats of plant closing have a particularly strong coercive effect inasmuch as they affect the jobs and livelihood of all employees. See *General Stencils*, 195 NLRB 1109 (1972). That Respondent was achieving its objective of disrupting the workplace and placing employee adherence to the Union in doubt is borne out in the testimony that the subject of plant closing was circulating as a constant rumor throughout the dealership.

Employer agents are not privileged to make coercive statements merely because employees inquire about their views on the union movement. Indeed, such inquiries provide the perfect opportunity to pass along the employer's sentiments without appearing to have initiated the interchange. It is just such a setting which Respondent now urges insulates it from the unlawful consequences of its agents' conduct. Further, the informal nature of the circumstances under which the conversations took place only serves to confirm the normal day-to-day ambiance at the workplace rather than providing a defense to the threats which were actually made.

In no instance did any supervisor claim that his remarks were his opinion only; invariably each of Respondent's agents attributed his view of the nature of the Employer's negative response to a successful union effort to the anticipated and articulated actions of Respondent's president, Richard Izzo, or to the "Company" in general. Respondent submitted no evidence which would tend to support its contention that the managers of the various departments who passed along the threat were speaking in any other than in a superior-inferior relationship or that Izzo lacked either the means or the will to act on his threat. Neither did Service Manager Staddon articulate to the employees that his remark about plant closing was based on his understanding of Respondent's financial condition. Even if he had, such a statement hardly meets the test required to show for its protection that it constitutes a prediction carefully phrased on the basis of objective fact conveying an employer's belief as to demonstrably probable consequences beyond the employer's control. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

Watroba's privately arranged (in his office) solicitations of employee grievances and subsequent offers of an in-house union along with the various, seemingly moderate, improvements in benefits which appear to have impelled union affiliations in the first place form part of the pattern of Superior's response to the union effort, consistent with the earlier threats designed to cut short employee adherence which, when they proved ineffective, now turned to an attempt to "buy off" the workers as the date for the scheduled election approached. Watroba was now dealing with an employee probably more malleable than the key union leader who by this time had been laid off and removed from the work force. The two meetings, at which the grievances were first solicited and then offers made, constitute a course of conduct independently violative of Section 8(a)(1).

Jarmusz' layoff, coupled with Respondent's contemporaneous rejection of the International Cable repair work brought in by Jarmusz and cutback of used car repair work, either of which would have provided sufficient work to have retained the two collision shop employees without layoff, constitutes an independent violation of Section 8(a)(3) and (1) of the Act. Under the Supreme Court's formulation in *Transportation Management Corp.*, 462 U.S. 393 (1983), the evidence establishes that Jarmusz' protected concerted activities, of which Respondent had full knowledge, were a substantial motivating factor in its decision to lay him off on October 25.[7] On that date Respondent had in its possession estimates upon the basis of which work could have been planned for Jarmusz sufficient to meet his minimum guarantee for at least 4 weeks' worth of work, aside from its intentional cutback of used car repairs evident from Izzo's contradictory testimony. Respondent's animosity to union organizations, its knowledge of Jarmusz' leading union role and the timing of its action, coupled with its conduct 18 days later designed to deprive Jarmusz of an effective participation in the Board's electoral process, under the circumstances of sufficient work having been available to have retained him in employment, warrant the result I have reached herein. Respondent has failed to show that absent Jarmusz' protected conduct it would have taken the same action against him. Since Respondent has failed to rebut the General Counsel's prima facie case it must be held to suffer the consequences of its illegal action, whether or not the International Cable work would have been sufficient alone to have warranted Jarmusz' retention beyond an immediate 2- to 4-week period.

Izzo's later approach to Jarmusz, to drop the instant case after his recall to employment, shows the degree to which Respondent believed Jarmusz' activity was central to the complaint and its prosecution. Izzo's statement, leaving hanging the implication that it could take further action against him if the matter was not dropped—action perhaps similar to that it had already taken against him—was as strong an act of intimidation, as if it had been uttered directly, and carried as powerful a jolt. This conduct constitutes a further act of interference with Jarmusz' protected Section 7 rights sufficient in itself to warrant a conclusion of an 8(a)(1) violation and a remedy in this case.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[7] It is clear that, along with my discrediting of Watroba's rationale for Jarmusz' layoff, I have also discredited his claim that Jarmusz was offered an additional 3 days of guaranteed employment before his layoff.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees that the dealership would be closed if the employees selected the Union as their collective-bargaining representative, by soliciting grievances and promising employees, in response, that they could have their own house union and improved wages, health benefits, and other conditions of employment, and by threatening its employees that it would take retaliatory action if the unfair labor practice case before the National Labor Relations Board was not dropped, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By causing a decrease in the hours worked by its collision shop employees by reducing the amount of work performed in its collision shop, and by laying off its employee Raymond Jarmusz on October 25, 1982, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent laid off Raymond Jarmusz in violation of Section 8(a)(3) and (1) of the Act, but also having found that Respondent restored Jarmusz to his former positon at a later date,[8] I deem it unnecessary to include an order requiring Respondent to reinstate him to his former position. However, I shall recommend that Respondent be ordered to cease and desist from engaging in such layoffs in the future and further, I shall recommend that Respondent make him whole for any loss of earnings or other monetary loss he may have suffered as a result of the discrimination against him, less interim earnings, if any for the period from his layoff on October 25, 1982, to his recall on February 4, 1983. The backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner described in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962), enf. denied on other grounds 332 F.2d 913 (9th Cir. 1963).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Superior Pontiac, Inc., Hamburg, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that the dealership would be closed if the employees selected the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Amalgamated Local 55 as their collective-bargaining representative, or that it would take retaliatory action if the unfair labor practice case before the National Labor Relations Board was not dropped, and soliciting grievances and promising employees, in response, that they could have their own house union and improved wages, health benefits, and other conditions of employment.

(b) Discouraging membership in the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Amalgamated Local 55, or in any other labor organization, by causing a decrease in the hours worked by its collision shop employees by reducing the amount of work performed in its collision shop and by laying off its employee Raymond Jarmusz.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Make Raymond Jarmusz whole for any loss of wages or other monetary loss he may have suffered by reason of the discrimination against him, in the manner set forth above in the section dealing with the remedy.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Hamburg, New York facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

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[8] The General Counsel has taken no position on the nature of the appropriate remedy for Jarmusz. However, given the fact that the record shows Jarmusz' return to work in the collision shop on February 4, 1983, and his continued employment as of April 25 and 26, 1983, at the time of the hearing, I conclude that the evidence warrants the conclusion I reach to omit an order to reinstate him to his former position.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten any of you that the dealership would be closed if you selected the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Amalgamated Local 55 as your collective-bargaining representative, or that we would take retaliatory action if the unfair labor practice case before the National Labor Relations Board was not dropped, and we will not solicit your grievances and promise you, in return, that you may have your own house union and improved wages, health benefits, and other conditions of employment.

WE WILL NOT discourage your membership in the aforementioned Union, or in any other labor organization, by causing a decrease in the hours worked by the collision shop employees by reducing the amount of work performed in our collision shop or by laying off employee Raymond Jarmusz.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL make Raymond Jarmusz whole for any loss of wages or other monetary loss he may have suffered by reason of our discriminatory action in laying him off from October 25, 1982, to February 4, 1983, plus interest.

SUPERIOR PONTIAC, INC.